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In The

# Supreme Court of the United States

October Term, 1979

No. 79-260

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR,

*Petitioner,*

vs.

STATE OF IDAHO, ET AL.

## BRIEF FOR THE STATE OF IDAHO

DAVID H. LEROY
Attorney General
State of Idaho

W. HUGH O'RIORDAN
Deputy Attorney General
Chief, Natural Resources Division

JOSEPHINE P. BEEMAN
Deputy Attorney General
Department of Water Resources

Statehouse
Boise, Idaho 83720

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

# INDEX


Pages

Question Presented ..... 1

Statutes Involved ..... 2

Statement of the Case ..... 2

History of the Carey Act ..... 2

The Case Below ..... 5

Introduction and Summary of Argument ..... 6

Argument:

I. The Carey Act grants Idaho contractual entitlement to desert lands. ..... 9

II. The plain language of the Carey Act shows the establishment of an entitlement to desert lands..... 14

III. The legislative history of the Carey Act demonstrates that Congress intended a conditional grant of public lands to the desert land states. ..... 19

A. A comparison of Senate Bill 1591 and the House Amendment establishes the similarity between the two statutes. ..... 20

B. The Congressional Record unequivocally establishes Congressional intent for a conditional grant of land. ..... 25

C. Representative McRae also understood that the western states were to receive a conditional grant. ..... 30

INDEX—Continued

Pages

1. Representative McRae realized that the purpose of the Carey Act was to irrigate desert lands. ..... 30

2. Representative McRae's statement did not establish the context upon which all other Congressional statements revolved. ..... 31

D. Subsequent Congressional action clearly establishes an intent to make a conditional grant. ..... 32

E. The Carey Act does not interfere with subsequent public land legislation. ..... 34

IV. There is no long standing departmental policy establishing unfettered discretion in the Secretary to deny Carey Act applications. ..... 36

V. Contemporaneous judicial statements and treatises recognize the establishment of an entitlement to desert land. ..... 40

A. Contemporaneous statements of jurists exhibit an understanding of the Carey Act as a conditional grant to the desert land states. ..... 40

B. The Carey Act's grant to the desert land states is uniformly acknowledged among historical commentators. ..... 46

Conclusion ..... 47

Certificate of Service ..... 48



CITATIONS

Pages

Cases and Administrative Decisions:

Farmers & M Bank v. Federal Reserve Bank, 262 U. S. 649 (1923) ..... 18

Great Northern R. Co. v. United States, 315 U. S. 272 (1942) ..... 19

Idaho Irr. Co. v. Gooding, 265 U. S. 518 (1924) ..... 7

Idaho Irr. Co. v. Gooding, 285 F. 453 (9th Cir. 1922), *aff'd in part and rev'd in part*, 265 U. S. 518 (1923) ..... 43

McDonald v. United States, 119 F. 2d 821 (9th Cir. 1941) ..... 19

M'Kinney v. Big Horn Basin Development Co., 167 F. 770 (8th Cir. 1909) ..... 43

State v. Marshall, 20 Mont. 510, 52 P. 268 (1898) 42

State v. Wright, 17 Mont. 565, 44 P. 89 (1896) ..... 41

State of Wyoming, 36 Pub. Lands Dec. 395 (1908) ..... 39

Supervisors, Rock Island Co. v. United States, 71 U. S. 435 (1867) ..... 18, 39

Twin Falls Land & Water Co. v. Twin Falls Canal Co., 7 F. Supp. 238 (D. Idaho 1933), *aff'd*, 79 F. 2d 431 (9th Cir. 1935) ..... 44

Twin Falls Salmon River Land & Water Co. v. Caldwell, 242 F. 177 (9th Cir. 1917), aff'd on rehearing, 272 F. 356 (9th Cir. 1921) ..... 43

CITATIONS—Continued

Pages

United States v. Denver & Rio Grande R. Co., 150 U. S. 1 (1893) ..... 19

Volkswagenwerk v. FMC, 390 U. S. 261 (1968) ..... 37, 40

Yakima Development Co. v. Washington, 34 Pub. Lands Dec. 453 (1906) ..... 39

Statutes, Resolutions and Regulations:

Act of February 24, 1909, 35 Stat. 644, 645, 43 U. S. C. § 647 (1976) ..... 16

Act of March 3, 1901, ch. 853, 31 Stat. 1188, 43 U. S. C. § 641 (1976) ..... 1, 3, 6, 11, 15, 24

Act of March 15, 1910, ch. 96, 36 Stat. 237, 43 U. S. C. (1970 ed.) § 643 (repealed 1976) ..... 2

Act of May 27, 1908, ch. 200, § 1, 35 Stat. 347, 43 U. S. C. § 645 (1976) ..... 33

Act of June 11, 1896, ch. 420, § 1, 29 Stat. 434, 43 U. S. C. § 642 (1976) ..... 2, 3, 33

Ariz. Rev. Stat. § 37-701 (1974) (originally enacted 1912 Ariz. Sess. Laws, ch. 96, §§ 1, 2) ..... 13

Cal. Gen. Laws Ann. act 6283, § 1 (Deering 1944) (originally enacted 1915 Cal. Stat. ch. 613, P. 1140) (repealed 1949 Cal. Stat. ch. 941 p. 1716 ..... 13

Carey Act of August 18, 1894, ch. 301, § 4, 28 Stat. 422, 43 U. S. C. § 641 (1976) ..... 2



CITATIONS—Continued

Pages

Carey Act Regulations, 37 Pub. Lands Dec. 624 (1909) ..... 37

Classification and Multiple Use Act, 43 U. S. C. §§ 1411-1418 (1970) (became obsolute in December 1970 by virtue of provisions in 43 U. S. C. § 1418) ..... 35

Colo. Rev. Stat. § 36-3-101 (1973) (originally enacted 1895 Colo. Sess. Laws, p. 157) ..... 13

Desert Land Act, 43 U. S. C. §§ 321-339 (1976) ..... 3, 9

Federal Land Policy and Management Act of 1976, 43 U. S. C. §§ 1701-1782 (1976) ..... 36

Federal Land Policy and Management Act of 1976, Pub. L. No. 95-579, Title VII, § 704 (a), 90 Stat. 2792 (1976) ..... 16

Homestead Act, 43 U. S. C. §§ 161-302 (1976) ..... 3, 9

*Idaho Code*, § 42-2001 (1977) ..... 12, 47

Mont. Rev. Codes Ann. § 81-2101 (1947) (originally enacted 1905 Mont. Laws ch. 105, § 1) (repealed 1963 Mont. Laws, ch. 147, § 242; 1965 Mont. Laws, ch. 280, § 2) (an earlier acceptance also appears at Mont. Codes Ann. § 3530 (1895)) ..... 13

Nev. Rev. Stat. § 324.020 (1973) (originally enacted 1911 Nev. Stat., Part 1:76) ..... 13

N. M. Stat. Ann. § 7-4-1 (1953) (originally enacted 1909 N. M. Laws, ch. 102, § 1) (repealed 1976 N. M. Laws, ch. 27, § 1) ..... 13

CITATIONS—Continued


Pages

OR. Rev. Stat. § 555.010 (1977) (originally enacted, 1909 Or. Laws, ch. 226, § 1) 1901 Or. Laws, p. 378 ..... 13

Public Resolution No. 28 (May 25, 1908), 35 Stat. 577 ..... 33

S. D. Comp. Laws, Vol. I, p. 862 (1913) (originally enacted 1909 S. D. Sess. Laws, ch. 79) ..... 13

Swamp Land Act of 1850, 9 Stat. 519, ch. 84, 43 U. S. C. §§ 982-984 (1976) ..... 23

Taylor Grazing Act, Section 7, 43 U. S. C. § 315f (1976) ..... 35

Timber and Stone Act, 43 U. S. C. §§ 311-313 (repealed 1955) ..... 3

Utah Code Ann. § 65-3-1 (1953) (originally enacted 1902 Utah Laws, ch. 56, § 1) ..... 13

Wash. Rev. Code Ann. § 79.48.010 (1962) (originally enacted 1895 Wash. Laws, ch. 166, § 1, p. 452) (repealed 1977 Wash. Laws, ch. 12, § 1) ..... 13

Wyo. Stat. § 36-7-101 (1977) (originally enacted 1895 Wyo. Sess. Laws, ch. 38, § 1) ..... 13

Miscellaneous:

Bureau of the Census, U. S. Dept. of Commerce, *Statistical Abstract of the United States,* 237, 239 (99th ed. 1978) ..... 4




CITATIONS—Continued


Pages

26 Cong. Rec. (1894):

p. 8123 ..... 20
p. 8388 ..... 23, 24
p. 8388-8394 ..... 19, 20, 24
p. 8389 ..... 21, 22, 30
p. 8390 ..... 25
p. 8391 ..... 23, 27
p. 8391-8392 ..... 11, 26
p. 8392 ..... 28
p. 8419 ..... 28
p. 8419-8435 ..... 23, 28
p. 8420 ..... 28
p. 8421 ..... 29
p. 8422-8424 ..... 10
p. 8423 ..... 29
p. 8427 ..... 30
p. 8428 ..... 30
p. 8429-8431 ..... 4
p. 8431 ..... 31
p. 8432-8433 ..... 10

34 Cong. Rec. (1901):

p. 3295 ..... 3, 8, 38

42 Cong. Rec. (1908):

p. 6436 ..... 33

CITATIONS—Continued

Pages

P. Gates, *History of Public Land Law Development* (1968) ..... 46

B. Hibbard, *A History of the Public Land Policies* (1924) (1965 reprint) ..... 10, 46

III *Kinney on Irrigation and Water Rights* (2d ed. 1912) ..... 10, 47

E. Louise Peffer, *The Closing of the Public Domain* 20 (1951) (1972 reprint) ..... 46

S. 1591, 53d Cong., 2d Sess. (1894) ..... 20 and throughout

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STATE OF IDAHO, ET AL.

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## BRIEF FOR THE STATE OF IDAHO

—o—

## QUESTION PRESENTED

Whether by enacting the Carey Act, 43 U. S. C. § 641 (1976), Congress made its own judgment that upon complying with the statutory reclamation conditions, the desert land states were entitled to receive public lands for use by individual citizens, or whether Congress intended to leave the issue of entitlement to public lands to the unlimited discretion of succeeding secretaries of the Interior.

—o—

## STATUTES INVOLVED

The Carey Act of August 18, 1894, ch. 301, § 4, 28 Stat. 422, 43 U. S. C. § 641 (1976), cited fully in the Petition for Certiorari at 2-4.

The Act of March 15, 1910, ch. 96, 36 Stat. 237, 43 U. S. C. (1970 ed.) § 643 (repealed 1976), cited fully in the Petition for Certiorari at 4-5.

The Act of June 11, 1896, ch. 420, § 1, 29 Stat. 434, 43 U. S. C. § 642 (1976), cited fully in Idaho's Brief Opposing Certiorari at 2.

—o—

## STATEMENT OF THE CASE

Respondent accepts in part the statement in the Government's brief, but submits the following additional information:

### 1. History of the Carey Act

It is important to examine closely the 1896 amendment to the Carey Act which the Government mentions briefly in a footnote. (Brief for Petitioner at 3, n. 2). Just two years following the enactment of the Carey Act, the Congress amended the Act to permit the states[1] to obtain liens

1 The Carey Act defines the states to which it applies as those "[s]tates in which there may be situated desert lands as defined by the [Desert Land Act] . . ." 43 U. S. C. § 641 (1976). The Desert Land Act states that "[a]ll lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crops, shall be deemed desert lands. . . ." 43 U. S. C. § 322 (1976).



against the land being reclaimed for the actual cost of irrigation systems and reasonable interest. Act of June 11, 1896, ch. 420, § 1, 29 Stat. 434, 43 U. S. C. § 642 (1976). This subsequent Congressional enactment specifically recognized that the Carey Act had made a *conditional grant* of lands to the states:

> "Under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, *in pursuance and acceptance of the terms of the grant made in Section 641 of this title. . . .*" 43 U. S. C. § 642 (1976). (Emphasis added.)

Five years later, in 1901, the Carey Act was again amended to extend the time within which the irrigation and reclamation of suitable desert lands could be accomplished. Act of March 3, 1901, ch. 853, 31 Stat. 1188, 43 U. S. C. § 641 (1976)[2]. The Secretary of the Interior supported this amendment, stating that without it "the states will not receive the full quota of the lands intended to be granted." 34 Cong. Rec. 3295 (1901). This intent of Congress that the Carey Act be a grant of lands is evident from the Congressional history of the Act.

The Carey Act was one of several federal programs enacted in the late 1800's to encourage the settlement and reclamation of the vast federal lands in the western United States. Unlike other land grant legislation such as the Desert Land Act, 43 U. S. C. §§ 321-339 (1976), Homestead Act, 43 U. S. C. §§ 161-302 (1976) and the Timber and Stone Act, 43 U. S. C. §§ 311-313 (repealed 1955), in which the

2 The result of this amendment was to allow a full period of ten years in which to complete the irrigation and reclamation of lands, dating from the segregation of the lands rather than from the original date of the Carey Act. The Secretary was also given discretion to extend this time period an additional five years.

federal government dealt directly with each settler, the Carey Act was an effort to involve the individual states in reclamation programs and have them initiate and supervise the settlement of desert lands. It represented a compromise between that faction of Congress that wanted the federal government to control the reclamation and take complete responsibility for the development of the public domain and those advocating an unconditional grant of land to the states. The proponents of the Carey Act felt that given a chance, states working in conjunction with private interests could best accomplish the reclaiming of arid western lands without federal reclamation laws. 26 Cong. Rec. 8429-8431 (1894). The states were to be given a definite entitlement to the desert lands.[3] However, to avoid speculation and misdealing, the federal government was to retain title until the states had met the conditions of the Carey Act and had actually performed the reclamation work. There was never any doubt that once the states performed their part of the bargain, the federal government was legally obligated to issue patents. The states were protected with a permanent entitlement to lands, but the United States retained the power to refuse to issue patent until the states complied with the terms of the Act and irrigated the lands.

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3 Idaho's entitlement is important because the state has a total land area of 52,933,000 acres, of which 63.7% or 33,722,000 acres are owned by the federal government. Of the land owned by the federal government in Idaho, 32,912,000 acres are public domain lands of which 11,498,000 are unappropriated and unreserved. Bureau of the Census, U. S. Dep't. of Commerce, *Statistical Abstract of the United States* 237, 239 (99th ed. 1978).



## 2. The Case Below

In both the district court and the court of appeals, the Interior Department not only argued that the state had no enforceable entitlement under the Carey Act, it also argued that a married woman could not make her own entry under the Carey Act and that a home built on the dividing line between entries could not qualify as a residence for both entries. Both courts below ruled against the Government on the second and third issues, primarily on constitutional grounds. The United States did not seek certiorari on either of these issues. The issue before this Court is therefore limited solely to the question of whether the Carey Act granted any enforceable entitlement to the State of Idaho with respect to irrigable desert lands.

In reviewing the decision of the district court, the Government failed to disclose that while the district court found that the State of Idaho had an entitlement to 3 million acres of irrigable desert lands, it also did not bar the Government from proceeding to classify and use federal lands which were suitable for Carey Act entry. In fact the district court specifically held that the Secretary could withdraw lands for valid purposes and that the state's remedy was to request reclassification of the lands for Carey Act entry (Petition for Certiorari, Appendix A at 19a).

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The basic issue before this Court is whether the Carey Act created enforceable rights in the desert land states or whether the Act was only a grant of discretionary authority to the Secretary of the Interior. Any decision on this issue must look to the Congressional policy behind the Act, unanimous contemporary understanding of the purpose of the Act, and administrative implementation of the Act.

The language of the statute is mandatory and not permissive. It provides that:

> "As fast as any State may furnish satisfactory proof . . . that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its assigns. . . ." 43 U. S. C. § 641 (1976).

Because the authority granted in the Carey Act has not been used by the states in recent years until new irrigation technology made it possible to irrigate large new tracts of desert lands, almost all of the legislative history, judicial commentary, and scholarly commentary about the act occurred near the turn of this century when the states were actively reclaiming land under the Act. This contemporary legislative history and comment by those most familiar with the Act uniformly establishes the understanding that the Carey Act granted enforceable rights to the desert land states. In 1923, this Court summarized the common understanding of the scope of the Carey Act when it stated:

> "By the Carey Act, *the United States binds itself to donate, grant, and patent to a state, complying with stated conditions,* desert lands, which the state may cause to be irrigated, reclaimed and occupied." *Idaho Irr. Co. v. Gooding,* 265 U. S. 518, 521 (1923). (Emphasis added.)



The legislative history of the Carey Act, together with contemporary commentary by judges and treatise authors, compel the same conclusion reached by the district court: Congress reached a compromise between those who favored outright grant of federal lands and those who favored continuing federal ownership. The lands were to be granted and conveyed to the states, but not until the states had complied with two reclamation conditions, irrigation and settlement. Once those conditions were met, the lands were to be granted and conveyed to the states. The grants were not to occur as a result of—nor were they to be conditioned upon—administrative decision-making. The decision to grant the land upon satisfaction of the congressionally specified conditions was made by Congress. It was not left to periodic changes in policy over the succeeding decades as new Interior Secretaries came and went.

The Government relies on the rule of statutory construction that interpretations of a statute by the administrative agency charged with its enforcement are entitled to deference. It is equally well established, however, that the administrator may not bootstrap an interpretation of the statute favorable to himself, but contrary to the legislative purpose and history. More importantly, in this case, the factual predicate for the rule asserted by the Government is missing: there has been no "consistent administrative interpretation" granting to the Secretary unfettered administrative discretion. To the contrary, as late as 1901, a Secretary of the Interior familiar with the

actual operation of the Act, in commenting on a proposed amendment to the Carey Act, specifically recognized that the Act constituted a grant to the desert land states:

> "The result [of the 10 year limitation] is that the States will not receive *the full quota of the lands intended to be granted, nor will the purposes of the act be anything like accomplished* unless the limitation with respect to time be so changed that the period of ten years shall commence to run in each instance from the date of the segregation instead of from the date *of the original granting act. . . .*
>
> If this amendment is adopted, the result will be that each State affected can from time to time obtain segregations of arid lands *under this grant until the full amount of 1,000,000 acres is obtained. . . .*"[4] 34 Cong. Rec. 3295 (1901). (Emphasis added.)

The record clearly establishes that Congress intended —and the Secretary of Interior agreed—that the Carey Act conditionally granted desert land to the western states for the purpose of helping those states reclaim their arid lands with bona fide settlers.

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4 Letter dater February 9, 1901, to Chairman of the Committee on Public Lands, United States Senate, 34 Cong. Rec. 3295.



## ARGUMENT

### I.

### The Carey Act grants Idaho contractual entitlement of desert land.

No serious student of the Carey Act, whether jurist or commentator, has ever claimed that Congress intended merely to provide the Secretary of Interior with an unlimited discretion to determine whether states would ever receive any lands under the Carey Act. To the contrary, legislators, jurists, and commentators alike have recognized in the Carey Act a binding obligation on the part of the United States to patent desert lands to the western states once the land has been irrigated and reclaimed for settlement purposes.

The Carey Act is unlike any other land-grant statute and must be understood as compromise legislation seeking to accomplish a specific purpose. Historically, Congressional grants of public lands have either been (1) *in praesenti* grants of specific parcels of land or the right to select specific parcels of land; or (2) grants of discretionary authority to the Secretary of the Interior to dispose of public lands when the Secretary deemed transfer appropriate. Examples of the latter type of authority are the Homestead Act, 43 U. S. C. §§ 161-302 (1976), and Desert Land Act, 43 U. S. C. §§ 321-339 (1976), in which the Secretary is authorized, but not obliged, to open public lands to settlement.

The Carey Act does not fit neatly into either category of public land grants. It is instead a contractual grant of an entitlement to public lands upon the performance of stated conditions. It was enacted as the result of Congres-

sional disagreements as to the best method of bringing western desert lands under productive irrigation. Desert lands easily irrigated by a single owner had largely been taken up by homesteaders in the late 1800's, and by 1894 the only way to bring irrigation water to remaining western lands was through large and expensive irrigation systems. One approach to the problem was to have the federal government fund and construct reclamation and irrigation systems, but Congress was reluctant to expend the necessary funds. 26 Cong. Rec. 8432-33 (1894); III *Kinney on Irrigation and Water Rights.* Sec. 1314 (2d ed. 1912) ("Kinney", hereafter). Another approach was to make an outright grant to the states and let them fund the irrigation systems. But Congress had made outright grants to the states before and had been strongly criticized for resulting fraud and land speculation. 26 Cong. Rec. 8422-24 (1894). Nevertheless, Congress had to decide the issue because there was great need in the western states to irrigate more land.

The compromise reached by the Carey Act was for the United States to contract with each of the desert land states to grant them up to 1,000,000 acres of desert lands for reclamation purposes.[5] The states were authorized to

5 The compromise nature of the Carey Act is discussed in detail in a contemporary history by B. Hibbard, *A History of the Public Land Policies* 434-439 (1924) (1965 reprint). Professor Hibbard describes the nature of the Carey Act as follows:

> "Two years later, 1894, a compromise measure was brought forward. It provided neither for cession outright to the states, nor for direct action by the United States. There was comparatively little debate in either

(Continued on next page)



select the lands, design and implement large irrigation projects, bring the lands under irrigation, and then distribute the lands to actual settlers in parcels of 160 acres or less. 43 U.S.C. § 641 (1976); 26 Cong. Rec. 8391-92 (1894). To safeguard the land against speculation, the states were not given an *in praesenti* grant of title. Before the states could receive title to the land, they had to actually irrigate and reclaim the land and have it settled by individual farmers. However, once reclamation and settlement were completed and the state had performed its part of the contract, then the United States agreed to deliver to the state a clear title to the land. *Id.* By the very terms of the Act, the United States agreed to issue patents to the states "as fast as any State may furnish satisfactory proof . . . that any of said lands are irrigated, reclaimed and occupied by actual settlers. . . ." 43 U.S.C. § 641 (1976).

The Carey Act differs from other land grant statutes in that it constitutes a contract between the federal government and the states which hold the desert lands. The Carey Act has been denominated a contractual offer, accepted by the states, binding the United States to donate

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> House of Congress accompanying the passage of the bill, but the respective committees on public lands apparently gave the measure much care and thought.
>
> This measure, which passed in August, 1894, is known as the Carey Act, in honor of Senator Carey of Wyoming, . . . Under this Act *the government agreed to donate* to certain states a quantity of land, not over 1,000,000 acres each, which they should cause to be settled, irrigated, and, in part, cultivated; in which even *the government agreed to grant patents either to the state or direct to the assignees of the state." Id.* at 436. (Emphasis added.)

and grant lands. This offer, once accepted by the state, created a contractual obligation binding the federal government. The foremost treatise on irrigation and water rights states the issue clearly:

> "Acceptance of the grant made by the Carey Act by the States named.—The first step to be taken by a State which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the State is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof. Now this acceptance can only be made by an Act of its legislature, in the exercise of its power, and in order to make such acceptance effective." Kinney, Sec. 1325.

In 1895, the State of Idaho formally accepted the offer of the federal government and a binding contract was created:

> "Acceptance of the Carey Act.—The State of Idaho accepts the conditions of section 4 of an act of congress, entitled 'An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes,' approved August 18, 1894, and the acts amendatory thereof, *together with all the grants of land to the state under the provisions of the aforesaid act and its amendments.*" Idaho Code, § 42-2001 (1977). (Emphasis added.)

Similar legislative acceptances of the offer to grant federal lands were enacted in each of the other desert land states.[6]

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6 Every statute (except Montana and South Dakota) accepting the offer of the United States made in the Carey Act has

(Continued on the next page)



The legislative history of the Carey Act is discussed in Section III. From the statements of those who enacted this legislation, from the language they used, and from the comments of scholarly contemporaries, it is clear that Congress itself made the judgment that within the quantity limits specified by the statute (3 million acres in Idaho's case), lands would be conveyed to any state that complied with the irrigation and reclamation conditions. That was not a policy judgment that was left to future Secretaries of the Interior. It was made by Congress itself. If Congress had intended to leave that judgment to the

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referred specifically to the "grants of land" made under the Carey Act: Arizona: Ariz. Rev. Stat. § 37-701 (1974) (originally enacted 1912 Ariz. Sess. Laws, ch. 96, §§ 1, 2); California: Cal. Gen. Laws Ann. act 6283, § 1 (Deering 1944) (originally enacted 1915 Cal. Stats, ch. 613 p. 1140) (repealed 1949 Cal. Stat., ch. 941, p. 1716); Colorado: Colo. Rev. Stat. § 36-3-101 (1973) (originally enacted 1895 Colo. Sess. Laws, p. 157); Montana: Mont. Rev. Codes Ann. § 81-2101 (1947) (originally enacted 1905 Mont. Laws, ch. 105, § 1) (repealed 1963 Mont. Laws, ch. 147, § 242; 1965 Mont. Laws, ch. 280, § 22) (An early acceptance also appears at Mont. Codes Ann. § 3530 (1895)); Nevada: Nev. Rev. Stat. § 324.020 (1973) (originally enacted 1911 Nev. Stat., Part 1:76); New Mexico: N. M. Stat. Ann. § 7-4-1 (1953) (originally enacted 1909 N. M. Laws, ch. 102, § 1) (repealed 1976 N. M. Laws, ch. 27, § 1); Oregon: Or. Rev. Stat. § 555.010 (1977) (originally enacted 1909 Or. Laws, ch. 226, § 1) (this statute again accepted the conditions of the Carey Act earlier accepted in 1901 Or. Laws, p. 378); South Dakota: S. D. Comp. Laws, Vol. I, p. 862 (1913) (originally enacted 1909 S. D. Sess. Laws, ch. 79) (subsequent history not available); Utah: Utah Code Ann. § 65-3-1 (1953) (originally enacted 1901 Utah Laws, ch. 56, § 1); Washington: Wash. Rev. Code Ann. § 79.48.010 (1962) (originally enacted 1895 Wash. Laws, ch. 166, § 1, p. 452) (repealed 1977 Wash. Laws, ch. 12, § 1); Wyoming: Wyo. Stat. § 36-7-101 (1977) (originally enacted 1895 Wyo. Sess. Laws, ch. 38, § 1).

Secretary of the Interior, it would have said so. Instead, the Act creates a binding obligation upon the United States to patent the lands described once the reclamation conditions are met. Neither the language of the statute, nor the legislative history, nor the comments of contemporary jurists or treatise authors recognize an administrative discretion with power to supersede the congressional judgment that lands would be conveyed once the reclamation conditions were met.

## II.

### The plain language of the Carey Act shows the establishment of an entitlement to desert lands.

For reasons discussed in Section III, Congress clearly intended by adoption of the Carey Act to make a conditional grant of irrigable desert lands. The grant was not subject to any administrative decision. It was subject only to irrigation and settlement, the two conditions specified by the statute. As fast as these two conditions were met, the Secretary was to patent the lands.

The Government (Brief for the Petitioner at 9-11) attempts to find support in the "plain language" of the statute for secretarial discretion to override the obligation to patent. The Government's position concerning the statutory language will not withstand analysis. The Carey Act describes the Secretary's duties in the plainest possible words and these words leave no room for secretarial discretion with respect to contracting to patent land to the states. A reading of the entire text of the Carey Act statute reveals that Congress clearly understood the difference between mandatory and directory legislation and intended the Carey Act to give the desert land states enforceable rights to irrigable desert lands. Following are some of the indicators of the congressional mandate found in the statute itself:



(1) The statute uses mandatory language in several instances and states that: "*patents shall be issued* to the State," as fast as the state furnishes proof of irrigation, reclamation, and settlement. 43 U. S. C. § 641 (1976).

The carefully limited language of discretion of the statute and amendments underscores the intent of Congress to place the Secretary in a position to verify that the conditions of the grant were met by the states.

The only administrative discretion provided by the statute concerns the manner of making proof of reclamation and settlement. Once proof of reclamation and settlement has been made, however, patents must issue. On that substantive question, the decision was made by Congress and there is nothing left for the Secretary or anyone else to decide.

(2) The statute grants the Secretary rule making power only as to the *manner* of making proof of compliance with the conditions of the statute:

> "As fast as any State may furnish satisfactory proof *according to such rules and regulations as may be prescribed by the Secretary of the Interior,* that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued. . . ." 43 U. S. C. § 641 (1976). (Emphasis added.)

If the Congress had intended that the Secretary have total discretion as to whether the states were to receive any

desert lands at all, the Congress would have granted him broad rule-making power over the entire Carey Act process. Instead, the Secretary was specifically limited to making rules governing the *procedures* to be followed in making reservations[7] and furnishing proof of reclamation.

(3) The statute expressly grants the Secretary the power "in his discretion [to] restore such lands to the public domain" if reclamation works are not commenced by the state within three years (or any approved extensions).[8] If the Secretary had the broad discretion he now claims, why did the Congress feel it necessary to grant him discretionary power in this specific instance. Such a limited grant of discretion argues strongly against the overall discretion claimed by the Government.

(4) The Carey Act was amended in 1909[9] to add Section 647 to extend the terms of the Act to different lands within part of the former Ute Indian reservation in Colorado. However, the 1909 Act specifically excluded the segregation of any land that "has valuable improvements,

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7 Prior to passage of the Federal Land Policy and Management Act of 1976, the Carey Act had a provision respecting the Secretary's rule making power as to the states' filing for a reservation of lands under the Carey Act:

> ". . . the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation . . ." 43 U. S. C. § 641 (1970). This particular language in § 641 was stricken by the Federal Land Policy and Management Act of 1976, Pub. L. No. 95-579, Title VII, § 704 (a), 90 Stat. 2792 (1976).

8 43 U. S. C. § 641 (1976).

9 Act of February 24, 1909, 35 Stat. 644, 645, 43 U. S. C. § 647 (1976).



or which [has] been reserved for any Indian schools or farm purposes." Such an express statutory limitation in a subsequent amendment demonstrates a Congressional understanding that the Carey Act was a mandate granted to the states by its terms and that a specific exclusion was required if certain lands were to be removed from the operation of the Act. If the Congress had understood that the Secretary of Interior had absolute discretion over the allowance of Carey Act lands, it would not have felt it necessary to limit the lands subject to the segregation claims of the states.

Within the limits of the English language it would be difficult to state any more clearly the Congressional judgment that patents were to issue as fast as any state furnished satisfactory proof that the lands had been irrigated, reclaimed and settled. Nevertheless, the Government places support for its decision in three statutory phrases: (1) The Act "authorizes" the Secretary to enter into contracts, (2) The Act granted "not exceeding" 3 million acres in Idaho's case, and (3) The President must "approve" all contracts. None of these statutory features is inconsistent with the Congressional purpose that is so overwhelmingly clear from other parts of the statute and its history.

Use of the word "authorized" is really neutral on the issue. Authorization would be necessary in the event of either Congressional intent to leave discretion to the Secretary, or to require him to issue patent as fast as irrigation and reclamation conditions were met. "Not exceeding" 3 million acres is merely a recognition of the limitations of the grant and of the reality that the states might not be able to identify irrigable lands and satisfy the conditions

of the full statutory authorization. Indeed, to date none has. Finally, the requirement of Presidential approval argues neither for nor against Secretarial discretion. Approval would be appropriate in either case, in order to ensure that the state had in fact met the conditions prescribed by Congress.

In short, the three features of the statute relied upon by the Government are consistent with either Secretarial discretion, or Secretarial obligation to patent as fast as irrigation and settlement are proven. To determine which of these policies Congress in fact selected, other parts of the statute and its history must be consulted.

The Government's analysis contravenes the basic rule for determining whether a statute is mandatory or directory. That rule, set forth in *Supervisors, Rock Island Co. v. United States,* 71 U. S. 435 (1867), establishes that what a public officer is empowered to do for the benefit of third parties shall be done:

> "What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his.
>
> In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty'." *Id.* at 476. *Accord: Farmers & M. Bank v. Federal Reserve Bank,* 262 U. S. 649 (1923).

The Government relies on the rule that land grants should be construed favorably to the Government and that doubts concerning land grants should always be resolved in favor of the Government. This Court has held that a land grant statute is to be liberally construed to carry out



its purposes. *Great Northern R. Co. v. United States,* 315 U. S. 272 (1942); affirming *McDonald v. United States,* 119 F. 2d 821 (9th Cir. 1941). Moreover, the rule cited by the Government is balanced in this case by the rule that land grant statutes are not to be construed so as to defeat the intent of the Congress or withhold a grant that is given by necessary or fair implication. *United States v. Denver & Rio Grande R. Co.,* 150 U. S. 1, 14 (1893).

The overriding principle of statutory construction is that statutes must be interpreted to achieve the intent of the legislators who enacted them. In the case of the Carey Act, that legislative intent is clear.

## III.

## The legislative history of the Carey Act demonstrates that Congress intended a conditional grant of public lands to the desert land states.

The Government misunderstands the legislative history of the Carey Act. In deciding between two alternative proposals when it debated the Carey Act, Congress was analyzing two very similar pieces of legislation. The Government's brief implies that the two pieces of legislation were different in fundamental approach, with the rejected Senate Bill (S. 1591) providing for an *in praesenti* grant and the House amendment which was adopted providing for no grant at all. Neither implication is correct.

There was no debate over whether there should be an outright grant of title to the states or a discretionary grant of authority to the Secretary of the Interior. The only issues debated by Congress were (1) whether it should make a conditional grant to the states, and (2) what the

conditions of that grant should be. It was clearly understood that under either the House or Senate version, if the statute were enacted, the states were conditionally granted land, with patents to be delivered as soon as the states had reclaimed and settled the land. 26 Cong. Rec. 8388-8394 (1894).

**A. A comparison of Senate Bill 1591 and the House Amendment establishes the similarity between the two statutes.**

Senate Bill 1591[10] (Brief for the Petitioner at 36) did not constitute an outright grant of land to the desert land states. That bill granted the states a ten year period to select arid lands and then allowed the states to reserve the selected lands for five years to complete reclamation. However, patent to the lands was not to be issued to the states until they irrigated and reclaimed the lands and located actual settlers upon them 26 Cong. Rec. 8388 (1894). This conditional grant of land was attached by the Senate to the sundry civil appropriation bill and sent to the House. 26 Cong. Rec. 8123 (1894). This procedure of attaching a public land bill to an appropriations act created some confusion in the legislative history.

Once the bill was in the House, Representative Pickler of South Dakota attempted to obtain House approval to S. 1591 as an amendment to the sundry civil appropriation bill, but met stiff opposition from congressmen who were

10 S. 1591, 53d Cong., 2d Sess. (1894).



concerned about possible land fraud and the definition of "arid lands" in the senate bill. 26 Cong. Rec. 8389 (1894). Representative McRae of Arkansas, chairman of the House Committee on Public lands, opposed any attempted public lands legislation in the sundry civil appropriation bill, but finally proposed an amendment to S. 1591 which was adopted and became the Carey Act. After Rep. McRae offered his proposal, Rep. Pickler withdrew his motion to accede to S. 1591 and moved that the House adopt the McRae amendment. Rep. Pickler thus became the sponsor of the Carey Act in the House of Representatives.[11] The House then read into the record a report from the General Land Office of the Department of the Interior which states that the House amendment was similar in its general purposes to S. 1591. 26 Cong. Rec. 8389 (1894).

A comparison of S. 1591 with the House amendment which became the Carey Act shows the following similarities and differences:

11 26 Cong. Rec. 8389, 8419 (1894). The relationship between Rep. McRae and Rep. Pickler on the bill is instructive:

> "Mr. Pickler: Mr. Speaker, while I prefer the measure reported by the Senate, I do not desire to antagonize this proposition of the gentlemen from Arkansas, [McRae] and I withdraw my motion.
>
> Mr. McRae: The gentleman must not understand that this [Carey Act] is any proposition of mine. This proposition was prepared with some care to take the place of the one in the bill. I am not advocating either one of them, but as between the two I very much prefer this to that of the Senate. But if the gentleman from South Dakota does not want it, he need not ac-

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Comparison of Legislation considered

| Item | S. 1591 | House Amendment |
|---|---|---|
| 1. Type of lands covered | "arid lands" | "desert lands" |
| 2. States benefited | Desert land states[12] plus Nebraska, Kansas & Oklahoma | Desert land states |
| 3. Type of grant | Grant upon conditions[13] | Grant upon conditions[14] |
| 4. Term to select land | 10 years | 10 years |
| 5. Reservation period after selection | 5 years | 5 years |
| 6. Conditions to grant | Irrigate and reclaim land | Irrigate and reclaim land |
| 7. Verification of conditions | No specific verification | Plans and proof required |

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cept it. I think that we are hardly ready to legislate upon this subject, anyway.

The SPEAKER pro tempora: The gentleman from South Dakota [Mr. Pickler] withdraws his motion, and moves that the House recede from its disagreement to the Senate amendment and agree to it with this substitute therefor. The question is on that motion." 26 Cong. Rec. 8389.

12 Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, Wyoming. See n. 1 *supra*.

13 S. 1591:

. . . there is hereby reserved, for the purposes and upon the conditions provided in this section, . . . one million acres of the surveyed public arid lands . . . to be selected by each of said States . . . such reservation to take effect from the date of such selection and approval . . . *Provided,* That any lands so reserved

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The extensive debate in the House of Representatives on the House amendments to S. 1591 makes it quite clear that the primary concern of the House was tightening the conditions of the grant to prevent land fraud. 26 Cong. Rec. 8391-8393, 8419-8435 (1894). The Congress had made outright grants of other lands and had been highly criticized because of resulting fraud and speculation. The most noted examples were grants under the Swamp Land

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. . . not . . . reclaimed within five years from the date of their selection and approval, . . . or as to which the state has not expended . . . $3 per acre . . . for reclamation . . . shall be released from such reservation . . .

. . . as rapidly as the State may furnish competent proof that any of said lands are reclaimed and occupied by actual settlers, in accordance with its . . . regulations, patents shall issue to the state . . . *Provided,* That said States shall not sell or dispose of more than 160 acres . . .to any one person . . ." S. 1591, 26 Cong. Rec. 8388 (1894).

14 House amendment:

". . . The Secretary of the Interior . . . is authorized and empowered . . .to contract and agree, . . . binding the United States to donate, grant, and patent to the State . . . such desert lands, not exceeding 1,000,000 acres in each State, as the State may cause to be irrigated, reclaimed, and cultivated by actual settlers within ten years after the passage of this act. . . .

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated, which shall exhibit a plan showing the mode of the contemplated irrigation . . . and the source of the water to be used for irrigation.

As fast as any State may furnish satisfactory proof, according to such rules and regulations as may be

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Act of 1850.[15] The House amendment was therefore designed to make absolutely certain that the title to the land did not pass to the states until the provisions of the Act concerning reclamation and settlement had been met. 26 Cong. Rec. 8388-8394 (1894).

The major modifications of S. 1591 by the House amendment were the restrictions on the type of lands covered and the additional conditions[16] that had to be met before the patents were issued to the lands. On the provision that controls this case, however, both bills were identical. Both directed that the Secretary issue patents to the states "as fast as any state may furnish satisfactory proof . . . that any of the lands are irrigated, reclaimed and occupied by actual settlers." 43 U.S.C. § 641; *accord*: 26 Cong. Rec. 8388 (1894).

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prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State . . . *Provided,* That said States shall not sell or dispose of more than 160 acres of said land to any one person. . . ." 26 Cong. Rec. 8339 (1894).

15 The Act of September 28, 1850, 9 Stat. 519, ch. 84, 43 U.S.C. §§ 982-984 (1976).

16 The additional conditions of the house amendment were requirements that (1) the states initially provide maps and plans to the Secretary of the Interior showing the selected land and proposed manner of irrigation, and (2) the final proof of irrigation, reclamation, and settlement was to be in accordance with rules and regulations prescribed by the Secretary of the Interior. S. 1591 did not require the filing of maps and plans, and the states would have established their own rules and regulations to verify irrigation, reclamation, and settlement.



**B. The Congressional Record unequivocally establishes congressional intent for a conditional grant of land.**

There is little evidence to support the Government's position that the Carey Act was merely a grant of administrative discretion to the Secretary of the Interior to contract with the states. It is significant that the Government has failed to cite a single member of Congress participating in the Carey Act debates who discussed or recognized such unlimited discretion on the part of the Secretary. To the contrary, the legislative history is replete with references to the conditional grant which Congress made to the states. An examination of the Congressional debates *after* the motion to replace S. 1591 with the House amendment is enlightening.

The report of the Secretary of the Interior on S. 1591, 26 Cong. Rec. 8390 (August 10, 1894), describing the workings of the Act fails to mention "Secretarial discretion".

> "The bill is clear and is guarded in its terms. It is in the interest of small settlers. The United States holds the title until the lands reserved are actually reclaimed and settled.
>
> The principal proposition involved, reclamation and settlement by individuals in small holdings, meets my strong approval, and this bill seems to me to present full opportunity for the practical experiment and under proper safeguards. *The United States retains title until reclamation is accomplished and the land occupied by actual settlers. This, if successful, is the great object to be attained;* and if unsuccessful the United States still holds the unencumbered fee." (Emphasis added.)

The House debate on August 10, 1894, contains the following colloquy discussing the nature of the conditional grant made to the states (26 Cong. Rec. 8391-92):

> "Mr. Pickler (sponsor of the legislation in the House): Mr. Speaker, I do not care to detain the committee further than to state just what the proposition is that the Senate has placed on this bill. There are between five and six hundred million acres of Government land not yet taken, consisting largely of arid and desert lands. The question has been discussed in the House for many years past as to the best disposition to make of those lands. *Now, this is simply a proposition to donate to each of the States that the desert land laws apply to,* a million acres of such lands. Gentlemen will understand that we have between five hundred and six hundred million acres of public domain left, and *this simply proposes to appropriate thirteen or fourteen millions of these arid lands,* giving 1,000,000 acres to each of the states named.
>
> Mr. Wilson of Washington: A million acres of lands.
>
> Mr. Pickler: Yes, a million acres of desert lands.
>
> Mr. Mercer: Provided there are a million acres of arid lands within the state.
>
> Mr. Pickler: Yes, these lands are doing nobody any good now, and they never will do anybody any good until they are irrigated. This proposition does not cost the Government anything. *It simply allows each of these States to take a million acres of these desert lands and see whether or not, under the direction of the State legislatures, they can be irrigated and reclaimed.*
>
> Mr. Mercer: Do I understand that the substitute offered by the gentleman from Arkansas [Mr. McRae] has been framed by the Land Office? (The substitute offered by McRae was the House amendment which became the original Carey Act.)



> Mr. Pickler: Yes, sir. The proposition that is now before the House is one that has been approved by the Commissioner of the General Land Office and I think there can be no objection to it. Gentlemen will remember how sensitive this House has shown itself from time to time in regard to making direct appropriations for the irrigation and reclamation of arid lands. *Now, here is a proposition which costs the Government nothing, but simply donates these lands to the states, leaving them to bear the burden of irrigation and reclamation. Furthermore, it is provided that the title to these lands shall not pass to the States until it is shown to the satisfaction of the Secretary of the Interior that the lands have been reclaimed according to law and the money expended upon them."* 26 Cong. Rec. 8391 (1894). (Emphasis added.)

Later, Representative Cannon from Illinois initiated a discussion regarding the nature of the grant made to the states.

> "Mr. Cannon of Illinois: . . . Now, then, when you come to enter upon this question *and grant a million acres in each one of these States* and undertake to properly grant it upon an hour or two's discussion; and put it upon an appropriation bill so that it must pass because the appropriation bill must pass, I am very much afraid that some improvident action will be taken . . . .
>
> Mr. Pickler: Mr. Speaker, I desire to say, in reply to the gentleman from Illinois, that for probably ten or twelve years this matter of irrigation in the arid regions has been before Congress, has been discussed, has been talked about, and we have so far failed to get any legislation in regard to the matter—an utter failure in any legislation. Now, this subject is well understood by the House of Representatives. Everybody knows that this land is lying out there. They know that it is useless; and everybody desires it reclaimed. It is a very simple proposition; and the an-

swer to the objection of the gentleman from Illinois is this: *That where this differs from the swamp-land grants is that the Government does not grant this at all. The Government only grants it and the State only receives title to it after it has made its proof that the land is reclaimed. So this does not pass to the States as the swamp land passed to the States.*" 26 Cong. Rec. 8392 (1894). (Emphasis added.)

The House debate on August 11, 1894, contains frequent references to the grant made to the states.[17] Each

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17 26 Cong. Rec. 8419, 8435, August 11, 1894:

"Mr. Kilgore: Do I understand that the proposition now before the House is to *cede to the several States* these arid public lands for the purpose of enabling the States to engage in the work of irrigation?

Mr. Bryan: Yes sir.

Mr. Kilgore: Well, I am willing that all such lands shall go to the States in which they are situated.

Mr. Bryan: I was going to say, Mr. Speaker, that *this proposition is to give to the States for this purpose* land which is absolutely worthless unless water is brought upon it artifically. . . .

Now, *this bill proposes to let the States take not exceeding 1,000,000 acres each* of these lands upon condition that they provide for their irrigation. . . . certainly *no one will object to allowing these States to take these lands,* useless to us as a nation, and irrigate them, make them valuable, and then sell them to citizens who will establish homes upon them.

It provides that *the lands shall only be given to the States when they have filed their maps and plans and shown just how they are going to get water* to accomplish irrigation. 26 Cong. Rec. 8419 (1894). (Emphasis added.)

Mr. Bryan: I was advocating the amendment proposed in the House which I think is a very satisfactory one, but I shall gladly support any changes which will give additional security to the people that the *ceded lands* will be properly used. 26 Cong. Rec. 8420 (1894). (Emphasis added.)

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Mr. Bretz: Mr. Speaker, I hope this amendment will not be adopted. It occurs to me that it is a revival of the old swampland regime in another form only. This amendment provides that if any State within this arid region shall expend $3 per acre in way of irrigation, *the State shall then become* the *owner of the real estate* within the borders, or rather the million acres . . . *To cede to these States this arid land* is to place in the hands of the Legislatures of the several States an opportunity to increase the already burdensome debts of these States and territories. 26 Cong. Rec. 8421 (1894). (Emphasis added.)

Mr. Geary: The purpose of this measure *is merely to permit a State in which the lands are situated* and which presumably knows more about the wants of its people than any outside authority, *to segregate from the public lands within the State* any such portions as may be designated as convenient tracts to be irrigated from a common source, making all that area capable of maintaining population. 26 Cong. Rec. 8423 (1894). (Emphasis added.)

Mr. Coombs: The proposition contained in this amendment *is that the Government shall give to each of the States* in which such lands exist a quantity not exceeding 1,000,000 acres, on the condition that they reclaim it and sell it to settlers in quantities not exceeding 160 acres to each. 26 Cong. Rec. 8423 (1894). (Emphasis added.)

Mr. Newlands: . . . Various measures have been introduced in Congress *with reference to the granting of these arid lands* to the various States. Measures looking to this end have repeatedly passed one House and failed of consideration in the other. . . . I think I am safe in saying that it is almost the unanimous sentiment of the various irrigation committees of this Congress and of past Congresses that grants of these lands should be made to the States, and that they should undertake the work of reclamation.

. . . It is true that this very amendment provides restrictions. . . . My position is against restrictions. But this I do say, *that if the grant should be made now,* and it should be found that the restrictions are unwise, we can hereafter modify the restrictions. . . .

Mr. Pickler: This amendment provides that *the lands shall not be ceded* to the states until they have

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of the statements noted from that day recognizes that the western states were receiving a conditional grant of land: Whether the word used is "grant", "give", "donation", "ceded", "take", or "owner", the evidence is overwhelming in favor of the states. Nowhere is the broad discretionary power now sought by the Secretary mentioned.

### C. Representative McRae also understood that the western states were to receive a conditional grant.

#### 1. Representative McRae realized that the purpose of the Carey Act was to irrigate desert lands.

The Government places great emphasis upon the role of Representative McRae. It is important to note that while Representative McRae provided the language for the House amendment, he was not the sponsor and supported it reluctantly. 26 Cong. Rec. 8389 (1894). It is a mistake to ascribe to him the sponsorship of the Carey Act.

Moreover Representative McRae's statements before the House illustrate that he understood the House Amendment to make not an outright grant, but a conditional grant to the states.

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complied with the regulations prescribed by the Secretary of the Interior. 26 Cong. Rec. 8427 (1894). (Emphasis added.)

Mr. Wilson of Washington: . . . There is a plateau arising above the Columbia River, upon its eastern side, to which a *donation of this character* might be of some benefit." 26 Cong. Rec. 8428 (1894). (Emphasis added.)



"Mr. McRae: The gentlemen will understand that no State is required to irrigate a million acres. The limitation proposed is 'not exceeding a million acres;' but each *State may irrigate less and secure it upon proper proof.*

Mr. McRae: . . . The amendment does not appear to be understood by some who have opposed it. It has been likened to the swamp land grant of September 28, 1850.

That was a grant *in praesenti* and passed the title as of the date of the grant. This is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed. That act passed the title to the whole of the swamp and overflowed lands which were unfit for cultivation and unsold at the time to the States. This grants nothing and authorizes no conveyance *until reclamation.*

There was no limit to the swamp land grant as to the area to be taken or the time when it should be selected. Under this bill the area to each State is limited to 1,000,000 acres and the time for reclamation ten years after contract. Under the swamp land grant the States were left free to dispose of the lands before reclamation and without any limitation as to the quantity that could be sold to one person. Under this amendment *the States must reclaim the land before they get it* and must provide for its settlement and occupancy by bona fide settlers, and can not sell exceeding 160 acres to any one person." 26 Cong. Rec. 8431 (1894). (Emphasis added.)

#### 2. Representative McRae's statement did not establish the context upon which all other congressional statements revolved.

The Government argues that much of the Congressional debate was the result of ". . . loose language (and)

was the product of a ventilation of fundamental issues of reclamation" (Brief for the Petitioner at 23). The attempt to discount the numerous statements of Congressmen referring to the Carey Act as a "grant", "gift", "donation", or "ceding" of public lands to the states by arguing that the speakers were either referring to S. 1591 or were just speaking in generalities about grants of public lands does not comport with the record of debates.

First, it makes no difference which bill the speakers referred to when discussing "grants" and "gifts" because the grant language of S. 1591 and the House amendment is nearly identical. If S. 1591 was a "grant" then the House amendment containing similar language also had to be a grant. The Congressmen understood that the only essential differences between the two pieces of legislation were the difference in description of the types of lands granted and the safeguards written into the House amendment.

Second, there is no indication in the Congressional debate that the Congressmen were speaking of "grants" in general or non-specific terms. Every speaker was clearly of the view that the Congress was granting public lands to the states, conditioned upon reclamation and irrigation.

A reading of the Congressional debates reveals that Congress was well aware of public land issues involved in the Carey Act. Congress intended a conditional grant. Subsequent legislation under the Carey Act reinforces this view.

**D. Subsequent congressional action clearly establishes an intent to make a conditional grant.**



The Government brief says nothing about Congressional actions subsequent to the original Carey Act. These subsequent enactments further substantiate Congress's conditional grant to the public land states. The Act of June 11, 1896, 29 Stat. 434, 43 U. S. C. § 642 (1976), specifically referenced the grants of land made in the Carey Act.

> "Under any law heretofore or hereafter enacted by any state, providing for the reclamation of arid lands, *in pursuance and acceptance of the terms of the grant made* in Section 641 of this title. . . ." 43 U. S. C. § 642 (1976). (Emphasis added.)

In 1908, Congress again amended the Carey Act to grant an additional two million acres of land to Idaho and one million acres to Wyoming. Act of May 27, 1908, ch. 200, § 1, 35 Stat. 347, 43 U. S. C. § 645 (1976); Public Resolution No. 28 (May 25, 1908), 35 Stat. 577. The debate on this legislation made it clear that in 1908 Congress understood that Carey Act lands were *granted* conditionally to the states:

> *House Debate* (42 Cong. Rec. 6436, May 16, 1908)
>
> "Mr. French: . . . The proposition is simply this: To pass this resolution *will grant to the State of Idaho* an additional 1,000,000 acres to be reclaimed under the terms of the Carey Act which was passed in 1894. The reason for offering this resolution is this: The State of Idaho has practically exhausted the million acres *granted under that act.* Some of this land has already passed to patent; some of it has been settled and patents are pending in the Department. . . .
>
> Mr. Williams: I desire to ask the gentlemen what is the difference between this bill and the bill which we voted down the other day?

> Mr. French: The difference between this bill and the bill that was voted down on Monday is this: That resolution *gave to both the States, Idaho and Wyoming,* 2,000,000 acres of land each. This limits *the grant to Idaho* alone and cuts *the grant* in two, making it a grant of 1,000,000 acres." (Emphasis added.)

If Congress when it debated the Carey Act in 1894 was discussing "grants" only in generalities, why does the legislative history continue to refer to specific "grants" to the states under the Carey Act in amendments and debates on amendments for the next 14 years?

The entire legislative history of the Carey Act and its subsequent amendments shows that although an outright grant of possession was not made, the United States did bind itself to grant the lands to the states if the states complied with the provisions of the Act and actually reclaimed the lands and placed settlers on them. The Act was a conditional grant and the federal government was obliged to issue patents once the conditions were met. Nowhere in the legislative history is there the slightest mention or discussion of any discretionary power in the Secretary of the Interior to deny applications when states had met the conditions of the Act.

### E. The Carey Act does not interfere with subsequent public land legislation.

The Government's final legislative history argument is that Congress could not have intended to make a conditional grant under the Carey Act because a "floating entitlement" to desert lands would impede the Secretary of the Interior in his duty to administer the public lands for the benefit of all. The district court's decision, however, will not impede the Secretary's orderly administra-



tion of public lands. The Court did not hold that Congress established the Carey Act as a special entitlement which superseded all subsequent land use statutes, but carefully outlined the limits of the power of the states to claim Carey Act lands and the limits of the power of the Secretary of the Interior to deny proper Carey Act applications. The decision of the district court is workable and gives effect to all land use statutes.

The Secretary's continuing classification authority under Section 7 of the Taylor Grazing Act[18], and the Secretary's former classification decisions under the Classification and Multiple Use Act[19], are not overridden by the Carey Act. In fact, the Secretary's classification under these acts actually assists in determining which lands are desert lands and most appropriate for Carey Act claims. The district court properly analyzed the relationship of both classification statutes and the Carey Act by finding that the Secretary of the Interior could properly classify lands and make proper and necessary withdrawals. However, the court held that in acting under the classification statutes, the Secretary is also under a duty not to make arbitrary classifications and is under a duty to make sufficient lands available to the State of Idaho to meet the Carey Act entitlements. When considered together, the Taylor Grazing Act, the Classification and Multiple Use Act, and the Carey Act provide a reasoned and effective approach to both the management of public lands in Idaho

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18 43 U. S. C. § 315f (1976).

19 43 U. S. C. §§ 1411-1418 (1970) (became obsolete in December, 1970 by virtue of provisions in 43 U. S. C. § 1418).

and the protection of Idaho's entitlement under the Carey Act.

Subsequent to the entry of the district court judgment, Congress enacted the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 43 U. S. C. §§ 1701-1782 (1976), which restated the entire law dealing with the ownership and management of public lands. The Federal Land Policy and Management Act of 1976 did not modify or repeal the Carey Act, but provided that "[n]othing in this Act shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act." 43 U. S. C. § 1701 note (1976). Although the Act contained a great many repealers of homestead and other land-grant statutes, the Act did not repeal or modify any of the basic provisions of the Carey Act. The Act did provide mechanical means for processing Carey Act withdrawal claims.

The decision of the district court does not prevent the Secretary of the Interior from proceeding in an orderly manner to administer the public lands in Idaho. He may proceed to classify and manage lands as required by law, subject only to the duty to make available to the state desert lands suitable for reclamation purposes when the state requests them.

## IV.

### There is no long standing departmental policy establishing unfettered discretion in the Secretary to deny Carey Act applications.

It is well established that the rule regarding deference to consistent administrative interpretation applies



only to statutes reasonably susceptible of different constructions and that the federal courts are not obligated to follow any administrative decisions that are inconsistent with a statutory mandate or that frustrate Congressional intent. *Volkswagenwerk v. FMC,* 390 U. S. 261, 272 (1968). In this case, however, the only consistent administrative action taken by the Interior Department with respect to the Carey Act deals with the procedure for filing claims. This is, of course, consistent with the statute itself which gave the Secretary discretion over the means by which Carey Act patents were to be obtained, but not over whether the state had the right to pursue its entitlement and attempt the irrigation and settlement leading to patent.

Concerning the issue of secretarial discretion, deference to consistent administrative interpretation is inapplicable. There has been no consistent administrative interpretation. The original Carey Act Regulations specify in detail the information and material which the states must furnish to comply with the requirements of the Act. 37 Pub. Lands Dec. 624 (1909). No mention was made of any Secretarial authority to decide that a desert land state could not pursue patent of the acres granted it. Indeed, the whole thrust of the regulations was to limit the Secretary's authority.[20]

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20 These regulations contain detailed provisions for filing Carey Act applications. For example, lists received containing erasures will not be filed (Rule 5); carbon copies of the contract will not be accepted (Rule 6). In spite of this minutia of detail, no mention of Secretarial discretion is made. In fact the regulations by their detail, establish rigid limits to the Secretary's authority. One regulation, Form 5, which is the contract *required* to be executed by

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As late as 1901, the Secretary of the Interior, in commenting on a proposed amendment to the Carey Act, specifically recognized that the Act constituted a grant to the desert land states: "If this amendment is adopted, the result will be that each state affected can from time to time obtain segregations of arid lands *under this grant until the full amount of 1,000,000 acres is obtained . . . .*" 34 Cong. Rec. 3295 (1901) (Emphasis added). This 1901 letter from the Secretary of the Interior, together with

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the State and the Secretary clearly delimits the authority of the Secretary.

> ". . . behalf of the United States of America, party of the first part, and — for and on behalf of the State of —, party of the second part, witnesseth:
>
> That in consideration of the stipulations and agreements hereinafter made, and of the fact that said State has, under the provisions of section 4 of the act of Congress approved August 18, 1894, of the act of Congress approved June 11, 1896, and of the act of Congress approved March 3, 1901, a through —, its proper officer, thereunto *duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character and particularly described as follows, to wit:* List No. — (here insert list of lands and total area), and has filed a map of said lands and exhibited a plan showing the mode by which it is proposed that said lands shall be irrigated and reclaimed and the source of the water to be used for that purpose, the said party of the first part contracts and approval of —, b President thereof, *hereby binds the United States of America to donate, grant, and patent to said State, or to its* assigns, free from cost for survey or price, c any particular tract or tracts of said lands, whenever an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the same, in accordance with the provisions of said act of Congress, and with the regulations issued thereunder, and with the terms of this contract, at any time within ten years from the date of the approval of the said map of the lands." 37 Pub. Lands Dec. 624 (1909).



the original regulations, leave no doubt about the original understanding of the Interior Department concerning secretarial discretion.

There is only a single decision, *State of Wyoming,* 36 Pub. Lands Dec. 395 (1908), which provides any support for the government. Even that case does not stand for the position urged by the Government. It stands for the limited position that public lands properly withdrawn prior to the filing of the state's application under the Carey Act are not available to the state and the Secretary therefore has authority and discretion to deny such an application. On this narrow issue, this single 1908 administrative decision incorrectly interprets the provisions of the Carey Act and should be disregarded. In any event, the precedent of the decision is limited to those situations in which a proper withdrawal has been made prior to the Carey Act application.

The broad dicta of *State of Wyoming, supra,* stands alone. This case has never been followed. A review of the entire body of administrative decisions by the Department of the Interior establishes that the 1908 *State of Wyoming* decision is the only decision holding that the Secretary has any discretion to deny any application by a state for Carey Act land.[21]

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21 *Yakima Development Co. v. Washington,* 34 Pub. Lands Dec. 453 (1906), holds only that when a state's proposal does not meet the requirements of the Carey Act it may be denied. There is no indication that the proposal in *Yakima* complied with the Carey Act and was denied by the Secretary by reason of discretion. In fact, this case illustrates the only type of discretion the Secretary is granted under the Act: administrative discretion to determine whenever the statutory requirements of the Act have been met. If the requirements are met, then the Secretary must issue the patent. *Supervisors, Rock Island Co. v. United States,* 71 U. S. 435, 476 (1867).

While courts must accord great weight to the interpretations given a statute by an agency, the overriding role of this Court is to effectuate Congressional intent. *Volkswagenwerk v. FMC,* 390 U. S. 261, 272 (1968). In other words, the Congressional policy underlying a statute must be given effect. The extensive legislative history of the Carey Act shows that the Government's construction must be rejected. There is no consistent interpretation of the Carey Act that permits the Secretary unfettered discretion. This, in light of the long standing practices of the western states, clearly establishes the error of the Government's position.

## V.

## Contemporaneous judicial statements and treatises recognize the establishment of an entitlement to desert lands.

### A. Contemporaneous statements of jurists exhibit an understanding of the Carey Act as a conditional grant to the desert land states.

Although judicial precedent is limited, all available cases which discuss the Carey Act recognize the Congressional intent to make a conditional grant of lands to the desert land states. Further, each decision, federal or state, recognizes that the states had an enforceable entitlement to the lands once the conditions had been performed. Much of this judicial precedent is contemporaneous with the Carey Act and the period of land development that followed its enactment. These cases bear close examination not only because of what they hold, but also because



they illustrate the understanding of jurists shortly following the enactment of the Carey Act.

The clearest statement of contemporary judicial understanding of the nature of the grant made by the Carey Act is found in the words of this Court in a 1923 decision:

> "By the Carey Act the United States binds itself to donate, grant, and patent to a state, complying with stated conditions, desert lands, which the state may cause to be irrigated, reclaimed, and occupied. The state is required to file a map of the land proposed to be irrigated showing the plan of irrigation, etc., and is authorized to make contracts, to cause the land to be reclaimed, and to induce their settlement and cultivation. *Upon satisfactory proof* the Secretary of the Interior *is directed to issue patents* to the State or its assigns." *Idaho Irr. Co. v. Gooding,* 265 U. S. 518, 521 (1923). (Emphasis added.)

The statements of the Supreme Court of Montana in two early cases demonstrate the public understanding existing in the 1890's that the federal government had indeed granted and ceded large quantities of desert lands to the states conditioned only on the reclamation of the lands by actual settlers. In *State v. Wright,* 17 Mont. 565, 44 P. 89 (Mont. 1896), the Court stated:

> ". . . We are satisfied that the law [Carey Act] is valid. The United States had the power to make the offer to the state, to grant it the lands provided the state would reclaim them. Of this there can be no doubt . . . . We believe the acceptance was valid. The legislature having accepted the offer, its next right, in the premises, was to provide a detailed method whereby the state could execute the acceptance and make it operative. This they have done. The attitude of the state thereby became that of an agent of the United States, to make effective the offer of the

latter to part with its desert lands to the state or its assigns, provided the state can reclaim such lands, and induce the actual settlement and cultivation thereof. This the state has undertaken to make possible by legislation. *If the state fails, the United States will not issue its patents. If the state succeeds, the United States has agreed to pass the title to the state, or its assigns, upon satisfactory proof of the fulfillment of the requirements of the acts of Congress.*" *Id.* at 572-573, P. at 92. (Emphasis added.)

Two years later, in *State v. Marshall,* 20 Mont. 510, 52 P. 268 (Mont. 1898) the same court stated:

> ". . . The *general government has by law made to the state conditionally a magnificent donation of lands.* It is of the highest importance that the legislature of the state should make provision by law for performing the conditions upon which the right of the people to acquire the lands thus donated depends. Our legislature, appreciating this important duty to the people, has been prompt in taking the necessary steps and providing the essential means for acquiring title to the arid lands granted, as said above, to the state." *Id.* at 514-515, P. at 270. (Emphasis added.)

The Montana jurists, who were contemporaries of the Congressmen who enacted the Carey Act in 1894, clearly understood that the Act was much more than a mere authorization to the Secretary of the Interior to permit the patent of desert lands if in his sole discretion he decided that such would be in the best interest of the public. These jurists understood and stated that the Carey Act was a *conditional* grant or donation of public lands to the states, and that once the states complied with the stated conditions the federal government was obligated to issue patent. This same understanding is demonstrated by the federal courts.



In *M'Kinney v. Big Horn Basin Development Co.,* 167 F. 770 (8th Cir. 1909), the Court of Appeals pointed out that Carey Act grants were not *in praesenti* as to possession because the state first had to comply with the conditions of the Act before patents would issue:

> "The underlying purpose of the acts of Congress in ceding the vast domain of desert lands within the territorial limits of the given state was, through the agency of the state government more immediately concerned, to speedily have them reclaimed from an unproductive waste by means of artificial irrigation, whereby they might become susceptible of human sustentation, bring population and wealth to the state. *But Congress did not make the grant to the state of such lands in mass to take effect in praesenti. The state was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent therefore should issue.*" *Id.* at 775. (Emphasis added.)

In *Twin Falls Salmon River Land & Water Co. v. Caldwell,* 242 F. 177 (9th Cir. 1917), *aff'd on rehearing,* 272 F. 356 (9th Cir. 1921) the Court of Appeals discussed the Carey Act as a "grant to the public land states";[22] and in *Idaho Irrigation Co. v. Gooding,* 285 F. 453 (9th Cir.

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22 "It is also apparent from the language of the act of August 18, 1894, that the grant to the public land states containing the specified desert lands was not a grant *in praesenti,* but, on the contrary, such states were made the agency through which the lands might be reclaimed, and the terms and conditions were therein prescribed by Congress, on the performance of which the title of the United States should pass by patent of the government." 242 F. at 184. (Emphasis added.)

"The act of Congress . . . further provided that as *fast as any such state should furnish satisfactory proof*

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1922), *aff'd in part and rev'd in part,* 265 U. S. 518 (1923), the same court emphasized that the purpose of Congress in the Carey Act was to reclaim the desert lands of the west by actual settlers on small tracts.[23]

Finally, the United States District Court in Idaho also stated its opinion that the Carey Act constituted a grant of lands to the states to be accepted by complying with the conditions of the Act. In *Twin Falls Land & Water Co. v. Twin Falls Canal Co.,* 7 F. Supp. 238 (D. Idaho, 1933), *aff'd,* 79 F. 2d 431 (9th Cir. 1935), the district court stated:

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according to the rules and regulations prescribed by the Secretary of the Interior of the reclamation, irrigation, and cultivation by actual settlers of any of such lands, *patent should be issued the state or its assigns thereof,* . . ." 242 F. at 183.

". . . It is further provided that, *as fast as any state may furnish satisfactory proof* according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of said lands are irrigated, reclaimed, and occupied by actual settlers, *patent shall be issued to the state or its assigns* for the said lands so reclaimed and settled." 272 F. at 359.

23 ". . . The act of Congress referred to expressly declared that its purpose was to aid the public land states in the reclamation of desert lands therein, and in the settlement, cultivation, and sale thereof in small amounts to actual settlers. To carry this purpose into effect, it was provided, among other things, that before the application of the state was allowed, or any contract was executed or any segregation of any of the desert lands from the public domain was ordered by the Secretary of the Interior, such state should file a map of the land proposed to be irrigated, together with a plan showing the mode of the contemplated irrigation, which plan should be sufficient to thoroughly irrigate and reclaim said desert lands, and prepare the same to raise ordinary agricultural crops, and also show the source of water to be used for its irrigation and reclamation." 285 F. at 457.



"In 1894 by the passage of the Carey Act a new policy to effectuate the reclamation of the desert lands of the arid West was initiated by the Congress. Title 43 USCA, Sec. 641, et seq. By its terms, as an aid to the cultivation of tracts upon such arid regions, the United States *offered to grant to states complying with the requirements* of the enactment, large bodies of desert land. *This statutory offer was formally accepted by the State of Idaho,* which laid down an elaborate and carefully guarded method of procedure for persons desiring to construct such projects and for settlers thereon". *Id.* at 240. (Emphasis added.)

"The State of Idaho in its sovereign capacity was interested in the development of prosperous communities upon desert lands within its boundaries. It has adopted a code, intricate in detail and various in ramification to protect that resource. Pursuant to this policy and with the beneficent purpose of utilizing this resource upon the 'Great American Desert' the legislation, state and national, heretofore adverted to, was enacted." *Id.* at 245.

Judicial precedent clearly takes a position directly contrary to that taken by the Government. None of the opinions supports the proposition that the Secretary has discretion to arbitrarily deny Carey Act applications. Rather, each recognizes that the intent of the Act is to make a conditional grant of an important resource to the desert land states. The states were charged with the duty of accepting the grant and implementing the procedures necessary to comply with the requirements of the Act. The grant is clear and absolute and the transfer of title to the states is limited only by the condition that the states comply with certain requirements of the Act prior to issuance of patent. Once a state has identified desert lands and requested their temporary withdrawal or segregation, the defendant Secretary may not arbitrarily

deny the request, but must allow the state to proceed to meet the other requirements of the Act and obtain patent.

### B. The Carey Act's grant to the desert land states is uniformly acknowledged among historical commentators.

The Government's brief cites several historical treatises which it considers authoritative on the issues of this case (Brief for the Petitioner at 12-15). It is significant that every one of the authoritative treatises cited by the Government in its brief clearly states that the purpose of the Carey Act was to make a conditional grant or guarantee of public lands to the desert land states.

Hibbard, in B. Hibbard, *A History of the Public Land Policies* 436 (1924) (1965 reprint) calls the Carey Act an agreement "to donate to certain states a quantity of land, . . ., which they should cause to be settled, irrigated and, in part, cultivated;". In a similar description, P. Gates, *History of Public Land Law Development* 648 (1968), characterizes the Carey Act as "a measure to provide for a grant of up to a million acres to each of the states containing desert lands to aid in their reclamation." Finally, E. Louise Peffer, *The Closing of the Public Domain* 20 (1951) (1972 reprint) states that the Carey Act "guaranteed to each of certain states up to one million acres of such dry public land within its borders as it was able to have irrigated, settled, and occupied."

The offer/acceptance nature of the grant made by the Carey Act has also been noted in Kinney's authoritative treatise on Irrigation and Water Rights:

> "Acceptance of the grant made by the Carey Act by the States named.—The first step to be taken by a State which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the State is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof." III *Kinney on Irrigation and Water Rights.* Sec. 1325 (2d ed. 1912).



The State of Idaho accepted the offer of the federal government in 1895,[24] and a binding contract was created.

## CONCLUSION

In this, as in any statutory interpretation case, the judicial task is to ascertain legislative intent. Any objective inquiry into the intent of the Congress that passed the Carey Act leads inevitably to the conclusion that Congress intended to grant desert lands under the Act subject only to two reclamation conditions: as fast as settlement and irrigation occurred, patents were to issue.

The task of ascertaining Congressional intent has been faithfully and correctly performed by the lower courts. They are the courts which serve most of the lands affected by the Carey Act. Their unanimous judgment should be upheld.

Respectfully submitted,

DAVID H. LEROY
Attorney General
State of Idaho

W. HUGH O'RIORDAN
Deputy Attorney General
Chief, Natural Resources

JOSEPHINE P. BEEMAN
Deputy Attorney General
Department of Water Resources

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24 *Idaho Code,* § 42-2001 (1977).

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 11th day of January, 1980, three copies of BRIEF FOR THE STATE OF IDAHO, were mailed, postage prepaid, to:

Honorable Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D. C. 20530

Honorable Robert K. Corbin
Attorney General of Arizona
1700 West Washington
Phoenix, Arizona 85007

Honorable George Deukmejian
Attorney General of California
800 Tishman Building
3580 Wilshire
Los Angeles, CA 90010

Honorable J. D. McFarlane
Attorney General of Colorado
1525 Sherman St., 3rd Floor
Denver, Colorado 80203

Honorable Michael T. Greeley
Attorney General of Montana
State Capitol
Helena, Montana 59601

Honorable Richard H. Bryan
Attorney General of Nevada
Heroes Mem. Bldg., Capitol Comp.
Carson City, Nevada 89710

Honorable James A. Redden
Attorney General of Oregon
100 State Office Bldg.
Salem, Oregon 97310

Honorable Robert B. Hansen
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

Honorable Slade Gorton
Attorney General of Washington
Temple of Justice
Olympia, Washington 98504

Honorable John D. Troughton
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82202

Terry L. Crapo, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO
P. O. Box 129
Idaho Falls, Idaho 83401

and further that all parties required to be served were served.

DAVID H. LEROY
Attorney General
State of Idaho